(3)

In the Supreme court of the united States

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no 09-768

Robert D. Straley

Petitioner

Against

Utah Board of pardons and
Clint Friel, warden

Respondents

Supreme Court, U.S.
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Petition for Rehearing on petition for writ
of certiorari to the Tenth circuit court
of Appeals

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Question presented

1. In 1981 members of this court questioned Greenholtz' mandatory language approach to determine when a state statute creates a liberty interest. Again in 1987 members of this court questioned Greenholtz' approach. In 1991 the Seventh circuit rejected Greenholtz' approach and created their own test. Finally in 1995 this court abandoned Greenholtz' approach. In Sandin v. conner this court said, the search for a negative implication from mandatory language has strayed from the real concerns undergirding the liberty protected by the Due process Clause. In 2009, in the case at hand, the Tenth circuit recognized; "[i]n Sandin, the supreme court abandoned Greenholtz' approach....." However, there is confusion among the circuits, including the D.C. circuit, as to the proper approach and subsequently the circuits have continued with Greenholtz.

what is the proper test to determine when a state statute creates a Federally-protected liberty interest? Is the Seventh circuits test the proper approach? Is wolff v. mcdonnell the proper approach?

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Opinion Below

The opinion of the United States court of Appeals appears at Appendix A to the petition for certiorari and reported at 582 F.3d. 1208.

Jurisdiction

The court denied the petition for certiorari on march 8, 2010. This petition for rehearing is filed within 25 days of that date as provided by rule 44.2. Jurisdiction is proper under 28 U.S.C. § 1254(1).

Reasons for granting the Rehearing

In accordance with Rule 44.2 of the Supreme court rules. This petition contains substantial grounds not previously presented. The court abandoned Greenholtz' mandatory language approach to determine when a State Statute creates a liberty interest. The courts decision however, has created conflict and thus guidance on the issue is of great importance. The court should correct the misinterpretation among the lower courts and make clear what the proper test is. Futhermore, the issue is of wide concern, is likely to recur and the Attorney General for the State of Utah is misrepresenting a Utah case.

I. This court abandoned Greenholtz' mandatory language approach to determine when a State Statute creates a liberty interest.

We begin with Greenholtz. Greenholtz answered two important questions; First, whether the Due process Clause itself created a liberty interest in parole. Second, whether a liberty interest in parole was a statutory creation of the State. Greenholtz v. Inmates of Neb. 442 U.S. 1 (1979). The court held that there is no constitutional or inherent right to parole prior to the expiration of a valid Sentence. Id at 7. The court did however, decide that the State Statute had created a protected liberty interest. Id at 7-11. As Sandin v. conner would later point out, "the court appearently accepted the inmates argument that the word 'shall' in the statute created a legitimate expectation of release." Nevertheless, the State ultimately prevailed because the minimal process it had awarded the prisoners was deemed sufficient under the Fourteenth Amendment.

within a decade Greenholtz' mandatory language approach was called into question. In Board of pardons v. Allen the court Stated;

> "There is far more to liberty than interest conferred by language in State statutes..... Four members of this court are of the view that the existence of a liberty interest in parole release is not solely a function of the wording of the governing statute..... I do not believe however, that the application of the Due process Clause to parole-release determination depends upon the wording of the Statute..."

Board of pardons v. Allen 482 U.S. 369, 373 N.3 (1987). However, "the parties ..... [did] not urge[] abandonment of Greenholtz ....." and thus the court continued with the mandatory language approach. Id at 376N6. Four years later the Seventh circuit rejected the approach stating;

> "we are skeptical about placing too much weight on grammatical distinctions ....." The court added. "[no] magic form of words is required to make a regulation mandatory as long as it sets out criteria that are binding, exhustive and definite."

Smith v. Shette 946 F.2d 1250, 1252-53 (7th cir 1991). In 1994 the Tenth circuit followed Greenholtz' approach and determined that the wording "..... may be released upon parole," contained in Utah's parole statute, Utah code Ann § 77-27-5 and 9," ..... created no 'legitamate expectation of release ....." malek v. Haun 26 F.3d. 1013, 1015-16 (10th cir 1994). A year after malek however, this court decided Sandin v. conner 515 U.S. 472 (1995). Sandin, as the Tenth circuit correctly points out in Straley "..... abandoned Greenholtz approach to determine whether **State regulations** or **Statutes** created a due process interest." Straley v. Utah Bd. of pardon 582 F.3d. 1208 ____ (10th cir 2009). while it is true "Sandin was decided only in the context of prison conditions." Id. Sandin, as argued below, expressly denounced Greenholtz **in both** prison policy situations and State Statute Situations.

Sandin's Due process analysis begins with wolff v. mcdonnell (a State Statute case) and meachum v. Fano (a prison policy case). The court explains how wolff and meachum are constitutionally correct. Sandin than explains how the liberty interest approach strayed off course, citing Greenholtz v. Inmates of Neb. (a State Statute case) and Hewitt v. Helms (a prison policy case) the court explained;

> "Shortly after meachum the court embarked on a different approach to defining State created liberty interest..... Greenholtz inmates alleged that they had been unconstitutionally denied parole ..... the court apparently accepted the inmates argument that the word 'shall' in the Statute created a legitimate expectation of release... .. Instead of looking to whether the State created an interest of 'real substance' comparable to the good time credit Scheme of wolff, the court asked whether the State had gone beyond issuing mere procedural guidelines and had used 'language of a unmistakably mandatory character' such that the incursion on liberty would not occur absent specified substantive predicates ....., **shifting the focus of the liberty inquiry to one based on the language of a particular regulation and not the nature of the deprivation** ..... The Search for a negative implication from mandatory language ..... has Strayed from the real concerns undergirding the liberty protected by the Due process Clause. The time has come to return to the principles correctly established in wolff and meachum. Following wolff, we recognize that States may under certain circumstances create liberty interests which are protected by the Due process Clause."

Sandin 515 U.S. at 476-85. Sandin goes on to explain what the Standard is when dealing with prison policy Situations.

i.e. atypical and significant hardship in relation to the ordinary incidents of prison life. However, its unclear from Sandin what the approach is when the question involves a state statute. Sandin returned to the principles that were correctly established in Wolff, (a state Statute case). Is Wolff the proper Standard? Wolff looked to the nature of the deprivation and characterized the liberty interest as one of "real substance", Wolff v. Mcdonnell 418 U.S. 539, 557 (1973). The circuits however, are confussed as to the proper Standard. The D.C. circuit wrestled with the question of whether Sandin overruled Greenholtz, but ultimately applied Greenholtz protege, the court said;

> "In this situation, we think the only course open to us is to comply with the rule expressed in Rodriguez de Quijas: If a precedent of this court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of Appeals should follow the case which directly controls, leaving to this court the prerogative of overruling its own decisions."

Ellis v. District of Columbia 84 F.3d 1413, 1417-18 (D.C. cir 1996), Compair, McQuillion v. Duncan 306 F. 3d. 895, 901-03 (9th cir 2002) (following Greenholtz, california Statute created a liberty interest), Closs v. Weber 238 F.3d. 1018, 1022 (8th cir 2001) (following Greenholtz state Statute gives parole board complete discretion, no protected liberty interest). Again the tenth circuit recognized "..... [t]he Supreme court abandoned its

Greenholtz' approach to determining whether a State ..... Statute created a liberty interes.. Straley 582 F.3d. at __ However, that conclusion, the Tenth circuit reasoned, was undermined by the fact that "...[I]n a case subsequent to sandin the supreme court relied on Greenholtz to reaffirm there is no constitutional entitlement to release ..... most importantly, the court once again reaffirmed its previous conclusion that a prisoner enjoys no substantive expectation for parole," Id. citing Ohio Adult parole Authority v. woodard 523 U.S. 272 (1998).

while it is true this court in Ohio Adult parole Authority relied on its prior decision in Greenholtz and held there was no constitutional right to "clemency," and the State of Ohio had not "created a substantive expectation of 'clemency'", Id. at 282-83. Ohio Adult parole Authority is distinguishable. First, it appears to be the same situation as Board of pardons v. Allen, i.e. **nobody urged abandonment of Greenholtz.** next, recognizing the abandonment of Greenholtz and adopting wolff's analysis is not going to change Ohio Adult parole Authority, there, the court specifically said;

> "under any analysis, the Governor's executive discretion [in clemency] need not be fettered..."

Id at 282. Finally, clemency is different from indeterminate sentencing.

II. Utah's indeterminate Sentencing System is a Federally-protected liberty interest and Utah's Attorney General is misrepresenting a Utah case.

The Utah Supreme court recognizes Utah's indeterminate Sentencing System as a "..... distinct species intelligibilis." McCoy V. Severson 222 P.2d 1058, 1064 (Utah 1950). Utah's System is distinct from anything this court has ever heard before and regardless of whether the Utah Bd. of pardons is performing a legislative function, has the power to Sentence or the power to parole. There decisions are, arguably, decisions of real substance. The Tenth circuit equated there decisions with that of "..... a Sentencing Judge in the Federal System." Malek 26 F. 3d. at 1016. The only difference between a Sentencing Judge in the Federal Sentencing System establishing a determinate Sentence from a indeterminate range and the Utah Bd. of pardons establishing a determinate Sentence from an indeterminate range **is the time of the determination.** (emphasis added). why require Sentencing Judges in the Federal System and State Systems to adhere to the Federal constitution and not require the Utah Bd. of pardon to adhere to the same? Regardless of whether these hearings are Sentencing hearings or administrative Sentencing hearings they require the equivalent Federal Due process protections. (emphasis added again).

The Tenth circuit and the District court made there decision in part on the fact that "between January 2002 and August 2006 petitioner was released on parole and on four separate occasions violated his parole". First, the parole information was submitted outside the pleadings and petitioner properly objected in the District court and raised the issue in the Appellate court. The Tenth circuit acknowleged that petitioner raised the issue but the court failed to address the question in the opinion, the court said;

> "In addition to the arguments he raised before the district court, Straley also contends the district court erred by failing to exclude certain evidence before dismissing the case for failure to state a claim for relief."

Straley 582 F.3d. at ___. Rule 12(b) provides that if matter outside the complaint are presented to and not excluded by the court, then the court should treat the motion as one for Summary judgment. The District court of Utah failed to exclude the information and failed to convert to Summary judgment which is reversible error. Ohio v. peterson et. al 584 F.2d 454, 457 (10th cir. 1978), Torres v. First State Bank of Sierra County 550 F.2d 1255, 1257 (10th cir 1977).

Next, parole does not change the sentence. This court has repeatedly recognized that the prisoner while on parole remains in legal custody.

In Warden Lewisburg penitentiary v. marrero 417 U.S. 666, 667 (1974). this court said;

> "..... the prisoner while on parole remains in legal custody and under the control of the parole board..... The Sentence to be served is still [in petitioner: case 15 years] whether or not he is granted parole....."

citing Anderson v. corall 263 U.S. 193 (1923). See also Jones v. cunningham 371 U.S. 236, 243 (1962). The Utah Supreme court recognized the principle as well, the court has said;

> "The granting of parole does not change the status of a prisoner; he is legally in custody..... until the parolee's sentence is terminated."

Reeves v. Turner 501 P.2d 1212, 1214 (Utah 1972). Finally, Utah's parole and parole revocation process can not be seen as legitimate. the Utah Supreme court has consistantly refussed to review the parole boards decisions, in Linden v. Dept. of corrections the court said;

> "Here, Linden asks us to conduct a substantive review of the Boards decision to revoke his parole. we find no clear Utah authority, that would indicate that Linden has a right to a substantive judicial review of the Board's decisions....."

Linden v. State. Dept. of corrections 81 P. 3d. 802, 805 (Utah App. 2003). the Utah Supreme court has said that, in spite of Utah code Ann § 77-27-5(3) non-review dictate, Utah courts will review the Boards

decisions in "unusual circumstances". However, when presented with "unusual circumstances," i.e. the boards refusal to grant credit for time served, which as this court knows is constitutionally mandated, the Utah Supreme court refused to review that decision. Thomas v. State 63 p.3d. 672, 674 (Utah 2002). The reality is the court has not and will not review the board's decisions.

In the States brief in opposition to petition for certiorari the Attorney General for the State of Utah states; "the Utah Supreme court expressly ordered that a new parole hearing be granted because an inmate's State procedural rights had been violated." Brief in opposition at 4-5. However, thats not the issue at hand. "[T]he touchstone of Due process is protection of the individual against arbitrary action of the Government." Wolff 418 U.S. at 558. In Preece v. House the case cited by the Attorney General, inmate Robert preece, in may of 1992 filed a complaint alleging that, inter alia, the board had inappropriately exceeded his sentencing guidelines by 36 months. In the Summer of 1992 the Attorney General for the State of Utah discovered that a typing error had occured, "the board staff had in fact miscalculated the guidelines by 36 month," on the bases of that information "the court continued the case to let the board of pardons decide what

they want to do in terms of taking the own action first." Preece v. House 886 P.2d. 508, 511 (Utah 1994). In September of 1992 the board conducted a hearing and refused to change there decision and refused to give a reason why preece should spend the longer term. In responce, the district court granted the writ and ordered preece to be released forthwith, the court said;

> "[U]der the circumstances of the error made as to the guidelines discussed with petitioner ..... the petitioner is entitled to an explanation of the error which the board refuses to do. Further, Our process requires fair process and petitioner is entitled to an explanation of why the error should be ignored and the longer term served....."

Id. at 510. subsequently both the Utah court of Appeal on Appeal and the Utah Supreme court on certiorari held that the determinations by the board are "inherently a sentencing function" but, under the **star chamber philosophy**, ultimately held the "Decisions of the board of pardons are final and not subject to judicial review." Id at 512.*

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* petitioner is faced with a similar situation. petitioners guideline called for 60 months (5 years) the board of pardons has given petitioner a 120 month (10 year) upward departure based upon "poor candiate for supervised release." A factor taken into account by the 60 month guidelines. members of this court have admitted that there is no principled way to apply Booker and Booker was disasterous. while it is true that Booker is a matter of Stare decisis. there are exceptions to Stare decisis and Im certain liberty is one of them. Thank you.

Conclusion

This case is of significant importance and for that reason petition for rehearing should be granted to reconsider whether certiorari should be granted. This court abandoned the mandatory language approach and Utah's indeterminate sentencing system creates a liberty interest calling Booker into question

Dated this: 23rd day of March 2010

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In the Supreme court of the united States

Robert D. Straley petitioner vs. Utah Bd. of pardons et, al Respondents	certificate of counsel pro se case no; 09-768

I do hereby certify that I am representing myself in this matter and that the petition for rehearing is made in Good faith.

Dated this 23rd day of march 2010

Robert D. Straley
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